UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 14 1983

MEMORANDUM

SUBJECT: Comments on UIC Issues

FROM: Victor J. Kimm, Director
Office of Drinking Water (WH-550)

TO: Water Division Directors
Regions I - X

In the process of developing the regulations for the direct implementation of the Underground Injection Control (UIC) program, two major problems have emerged: (1) how to deal with aquifer exemptions after promulgation; and (2) how to handle programs for Indian lands in the proposal. We have developed solutions to these problems which the Bridge Team generally supports.

As you will recall these two areas were also identified in Max Dodson's memorandum of February 17, 1983, as issues needing quick resolutions. We are working with several of you on the items identified in Max's memorandum. In the meantime, I would like to consult you on the direction in which we are going on these two issues.

Aquifer Exemptions

The regulations at Sec. 144.7 (old Sec. 122.35) currently specify that after a State UIC program is approved, the Director may, after notice and opportunity for public hearing, propose to exempt all or a portion of an underground source of drinking water (USDW). Exemptions must be approved by the Administrator and will be treated as "program revisions."

Section 145.32 (old section 123.13) distinguishes between "substantial program revisions" and "non-substantial program revisions." Substantial program revisions must be made through formal rulemaking, i.e., EPA must give notice, provide the opportunity for comment and hearing, and must publish its final decision in the Federal Register. Non-substantial program revisions may be processed less formally and may be approved by a letter from the Administrator.

Myron Knudson's memo of April 6, 1983, transmitted a draft Regional proposal which would, in effect, delegate the authority to make and approve all aquifer exemptions, program revisions and alternate mechanical integrity tests to the Regional Administrator with notification to Headquarters. Unfortunately this proposal will not work. Those program revisions and aquifer exemptions which are "substantial" must be approved through formal rulemaking. Furthermore, OGC has argued that, even absent the requirement regarding substantial program revisions, major exemption actions are important enough to require formal rulemaking under the Administrative Procedures Act. Under Section 1450 of the Safe Drinking Water Act, the Administrator cannot delegate the authority for formal rulemaking.

In developing the approach described below, we tried to be mindful of two things. One, while the existing regulations could be read to address only aquifer exemptions for primacy States, there is in fact a necessary parallel between what we do in delegated programs and in direct implementation programs. Second, in the approval of several State primacy applications, the Agency has committed to act on aquifer exemption requests within certain time periods. These commitments cannot be met if formal rulemaking is required in all cases.

Two further considerations should be noted here. First, during the settlement of the litigation we agreed to add a fifth criterion for aquifer exemption. This is limited to aquifers greater than 3,000 mg/l of TDS and is based on a finding that the aquifer or its portion "cannot reasonably be expected to serve as a source of drinking water." As specified in the regulations, such exemptions are approved through a 45 day "drop dead" mechanism which is not formal rulemaking. Second, we have made a decision that aquifer exemptions in direct implementation programs will not result in "free fire" zones but be limited to authorize injection for a specific purpose (e.g., hydrocarbon recovery, mining, etc.)

Our approach to aquifer exemptions after the start of an UIC program is to distinguish between major and minor exemptions.

1. Major Exemptions would be defined as any exemption of an aquifer containing less than 3,000 mg/l TDS:

   a. related to any Class I well;
   b. related to any other injection of hazardous waste; or
   c. not directly related to a specific permitting action.

Major exemptions would constitute substantial program revisions and could be approved only through formal rulemaking. In the case of delegated programs, the State would have to give notice and provide the opportunity for comment and hearing. The State's request would be submitted to the appropriate Region and referred to the Office of Drinking Water. In consultration with ODW, the Region would give notice in the Federal Register, take public comment and hold a hearing if requested. If the State consents and if its comment period is at least 30 days, this step could be met by holding a concurrent comment period and a joint hearing with the State. The Region would also prepare the response to comments together with any recommendations it cares to make. ODW would be responsible for preparing the final package with an action memo from the AA for Water and clearing it through the Agency's final clearance process. (We are negotiating an accelerated version of these processes similar to those used for SIP revisions). The final decision would be signed by the Administrator and published in the Federal Register.

In the case of direct implementation programs, the Region would only have to hold one comment period and this could be satisfied with notice in the Federal Register and comment on any related draft permit. After that, the HQ approval process would be essentially the same as for major exemptions proposed by primacy States.

2. Minor Exemptions would be all exemptions except the ones listed in #1 above and including aquifers greater than 3,000 mg/l of TDS exempted because they "cannot reasonably be expected to serve as USDWs."

Class II

All minor exemptions would constitute non-substantial program revisions and would not require formal rulemaking for approval. The authority to make or approve minor exemptions would be delegated to the Regional Administrators. The details will be worked out with you in the course of developing the formal delegations of authority. In the case of delegated programs, the State would submit its request after notice and opportunity for comment (which could be satisfied by its permitting process). The Region would review the justification and provide a decision in writing.

In the case of direct implementation programs, the permit process would satisfy the requirement for notice and comment period. The Region's decision on exemption can be made known as part of issuing the final permit.

While the above paragraphs describe the general process for the approval of minor aquifer exemptions, a formal concurrence by the Bridge Team and the AA for Water would be required in certain cases. We will work out a process to assure that critical time commitments can be met. Aquifer exemptions requiring concurrence are those related to:

a. new Class II fields (e.g., new water floods, new tertiary recovery operations and new permits for salt water disposal);
b. new Class III operations; or
c. new wells for experimental technologies (since these are Class V, an exemption is not required. However, certain States may choose to exempt for experimental wells, in which case there must be an EPA approval.

You will note that the distinction between major and minor actions is based largely on the class of wells involved. Other criteria could also be used, for example, the geographic extent of the exemption, whether it is general or only for a single purpose, whether there are requirements for restoration, etc.

Indian Lands

There are two central issues related to proposing for Indian lands: (1) whether to confine this proposal to the direct implementation States or whether to propose for all Indian lands at this time; and (2) how much flexibility to allow ourselves for other than Class II programs. We are currently drafting the package along the following lines.

For direct implementation States, the draft regulations would apply the program being proposed for a State to the Indian lands in that State (except for Navajo lands). The accompanying preamble would explain that while we are proposing the generic program, we intend to consult the Indian Tribes in the direct implementation States, and may adjust the requirements to accommodate their legitimate concerns.

For Indian lands in primacy States and for Osage and the Navajos we intend to include a preamble discussion that would, in effect, serve as a proposal. The discussion would explain:

- why EPA must regulate;
- that EPA has the following three options (as long as the requirements of Section 1421 (B)(1)(A)-(D) are met):
  - to promulgate the generic program;
  - to promulgate the State program; or
  - to promulgate some hybrid (including BIA, BLM and other requirements);
- that we intend to consult the affected tribes before making any decisions;
- that if we decide on either of the first 2 options, we will proceed directly to promulgation; and
- that if we decide to adopt a hybrid program significantly different from either 1 or 2 we will make a specific proposal before promulgation.

The advantages of dealing with Indian lands in primacy States now are that it initiates action in another areas of EPA's UIC responsibilities and leaves one fewer loose end hanging. Also, using the preamble to propose will probably allow us to move to promulgation in a number of States and thereby reduce the transaction costs associated with repeated cycles of proposal and promulgation.

I would like to have your reaction to these two approaches soon so I can keep the direct implementaion package moving. We will set up a conference call with you at a mutually convenient time on Tuesday, April 19. I hope that gives you enough time to prepare your comments.